INDEX

CITATIONS

380-039 O-70——1

Cases—Continued

Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 387

STATE OF CALIFORNIA, PETITIONER

v.

JOHN ANTHONY GREEN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the California Supreme Court (A. 104) is reported at 70 A.C. 696, 75 Cal. Rptr. 782, 451 P. 2d 422.

JURISDICTION

The judgment of the California Supreme Court was entered on March 21, 1969. By an order of June 18, 1969, Mr. Justice Brennan extended the time for filing the petition for a writ of certiorari to July 11, 1969, and by order of July 15, 1969, on a timely motion for further extension, Mr. Justice Marshall extended the time for filing to July 25, 1969. The case was docketed on that date. The Court granted the

petition for a writ of certiorari January 12, 1970 (A. 119). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the defendant's right to be confronted with adverse witnesses in a criminal trial, as guaranteed by the Sixth and Fourteenth Amendments to the Constitution, forbids the evidentiary use at trial of a witness' prior statements, where the witness admits at trial that he made the statements and is subject to unrestricted cross-examination regarding them,

(1) when the prior statement was sworn and subject to cross-examination when made;

(2) when the prior statement was neither sworn nor subject to cross-examination when made.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth and Fourteenth Amendments to the Constitution and Sections 770 and 1235 of the California Evidence Code (which permit evidentiary use of prior statements in the circumstances described in the Question Presented) are set out in the Appendix to Petitioner's Opening Brief.

INTEREST OF THE UNITED STATES

Although no present federal statute makes prior inconsistent statements of witnesses admissible for the truth of their content, and all the federal circuits save one [1] presently follow a rule that such prior statements

[1] *United States* v. *DeSisto*, 329 F. 2d 929 (C.A. 2), certiorari denied, 377 U.S. 979, represents the exception. *DeSisto* held that a prior inconsistent statement given under oath could be introduced as substantive evidence.

are admissible only for purposes of impeachment, the United States has an important interest to defend the right of Congress to modify these rules for the future. If the Confrontation Clause of the Sixth Amendment to the Constitution renders the California statute in this case unconstitutional, the ability of Congress and State legislatures (and courts) to modify rules of evidence in criminal trials, particularly with respect to hearsay, appears to be highly limited.

Our concern that Congress not be unduly restricted is increased by the pendency of the Proposed Rules of Evidence for the United States District Courts and Magistrates, promulgated by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (1969). Among the recommendations of the committee, which for the most part codify present law, is a provision making any prior inconsistent statement of a witness admissible as affirmative evidence (Rule 8-01(c)(2)(i)). This provision is virtually identical with the California statute here at issue.

STATEMENT

The United States relies, in the main, upon the statement of facts set out in petitioner's opening brief, pp. 3–8. To clarify certain aspects of its presentation, however, the following brief summary is submitted:

A major prosecution witness, one Porter, testified at petitioner's trial for furnishing a narcotic (marijuana) to a minor that he did not recall whether it was petitioner Green who had furnished the narcotic to him (A. 7–8). At that point, and through the subsequent testimony of Officer Wade, the state

sought to prove two prior statements by Porter that it was Green who had supplied him with the marijuana.

The first of these statements constituted Porter's testimony at a preliminary hearing, under oath and subject to cross-examination, that Green had been his supplier (A. 8–10; 18–22). At the trial, Porter said he didn't remember how he had testified at the preliminary hearing, but that he had done so and that he believed his statements at that hearing were the truth as he then believed it (A. 11, 20).

The second of these statements constituted Porter's conversation with Officer Wade, neither under oath nor subject to cross-examination, at the Los Angeles Police Juvenile Division Headquarters. Relating this statement at the trial, Officer Wade testified that Porter told him that Green had been his supplier for a kilo of marijuana (A. 37). Porter was recalled after Officer Wade's testimony, and admitted talking to Wade, that he might have told him about Green, and that he believed he was telling the truth at that time (A. 58–60).

Both prior statements were admitted into evidence as part of the prosecution's affirmative proof of guilt. Unless it might be thought that they were adopted by Porter at trial during the course of his examination and cross-examination, the prior statements constituted the only direct proof that Green was the person who had supplied Porter with marijuana—the offense with which he was charged. Other testimony, however, showed an association between Porter and respondent

in an apparent but abortive attempt to sell drugs to an undercover officer (A. 48–53).

On appeal to the state courts, the state treated the two statements differently. The California Supreme Court had earlier decided that a statement of the type made to Officer Wade could not be given affirmative use under the Confrontation Clause of the federal Constitution, as applied to the states through the Fourteenth Amendment, even though the declarant was subject to cross-examination at the trial itself. *California* v. *Johnson,* 68 Cal. 2d 646, 441 P. 2d 111, certiorari denied, 393 U.S. 1051. The state accordingly conceded that, under *Johnson,* error had occurred with respect to Officer Wade's testimony, but urged that error as harmless. The principal subject of argument below was the second statement. In *Johnson,* the California court had reserved judgment whether a statement of the type Porter made at the preliminary hearing—under oath and subject when made to cross-examination—could be given affirmative use consistent with the Sixth Amendment. In this case, the state court held that its use, too, was barred.

We have no doubt that this Court can and should reach both aspects of the problem. *Johnson* was decided on federal constitutional grounds which have not previously been considered in this Court. In these circumstances, while the state's concession may have been required by its respect for the prior decisions of the state court, it can hardly be binding here. In somewhat similar circumstances, this Court has noted its "obligation to lower courts to decide cases upon proper constitutional grounds in a manner which permits

them to conform their future behavior to the demands of the Constitution." *Sibron* v. *New York,* 392 U.S. 40, 59. We argue within that the proper constitutional resolution here is that affirmative use of *any* prior statement is constitutionally permissible, so long as the declarant is available for effective cross-examination at trial. If that argument is accepted, it follows that the case which prompted the concession was incorrectly decided and the concession, accordingly, may be disregarded.

ARGUMENT

I. INTRODUCTION AND SUMMARY

The Sixth Amendment to the Constitution of the United States guarantees to the accused in all criminal prosecutions the right "to be confronted with the witnesses against him." At its adoption, that phrase appears to have been thought so clear that it required no explanation; all that is known is that the Confrontation Clause was part of Madison's twelve proposed constitutional amendments and that it was passed without discussion. See Dumbauld, *The Bill of Rights,* 33–49, 53–54 (1957); see generally Rutland, *The Birth of the Bill of Rights* (1955);[2] cf. Note, *Preserving the Right to Confrontation* * * *,

[2] Rutland indicates that Madison "had leaned heavily" on the Virginia Declaration of Rights (1776) in drafting the amendments. Rutland, *op. cit.* at 202. The Virginia Declaration contained a provision that in all criminal prosecutions a "man hath a right * * * to be confronted with the accusers and witnesses." *Id.* at 232. This may well be the constitutional source of the specific term "confronted." See also Heller, *The Sixth Amendment*, Chapter II (1951).

113 U. Pa. L. Rev. 741, 743 (1965). Yet a simple meaning today appears beyond reach. At its most elemental, the clause requires that all the evidence submitted to the fact-finder be submitted in open court, during trial, with the accused having the opportunity to attend. *Parker* v. *Gladden,* 385 U.S. 363. But that has never been all. It has been linked as well with values requiring face-to-face accusation, an opportunity for the fact-finder to observe demeanor, the solemnity of an oath, an opportunity for the accused to test by cross-examination, and a sense that the prosecution must expose its case to adversary challenge to the maximum possible degree. Nonetheless, these values have rarely been made absolute; where necessity requires and trustworthiness permits, as in the case of "dying declarations," evidence is admitted at criminal trials which may satisfy only the last of them—that the prosecution has come forward with the best evidence it can produce. *E.g., Mattox* v. *United States,* 146 U.S. 140.

We start from the premise that the criminal trial is primarily a search for truth, within the context of a constitutional commitment to a particular mode of finding that truth, the adversary trial. Where circumstances for which the prosecution cannot be held responsible prevent the personal presentation of evidence, the search for truth is hindered, not aided, by the exclusion of trustworthy evidence available in another form. That hindrance is justified only if the circumstances are such as to prevent the accused from fairly testing the proffered evidence and the fact-finder from fairly measuring its worth in the adver-

sary process. In the circumstances of this case, the prosecution cannot be charged with Porter's failure to repeat on the stand the statements he made at the preliminary examination, and to Officer Wade. Since the witness freely admitted making the prior statements, subjecting himself to searching examination of the variances thus exposed, adversary challenge was fully possible and the fact-finder was in a position fairly to judge the truth of the matter. Exclusion of this evidence would impede the search for truth, yet, while it might in fact make conviction less likely, would vindicate no substantial interest of the accused.

II. ADMISSION OF THE PRIOR INCONSISTENT STATEMENTS OF A WITNESS EXPOSED TO CROSS EXAMINATION AT TRIAL WOULD NOT OFFEND THE COMMON UNDERSTANDING OF THE RIGHT TO "CONFRONTATION" AT THE ENACTMENT OF THE BILL OF RIGHTS

Since the documentary records of the proceedings leading to the adoption of the Bill of Rights give no indication of the precise nature of the rights thought to be secured by the Confrontation Clause, the historical setting of the right to "confrontation" is particularly important. Examination of that setting leads to the conclusion that it was particularly linked with the presence of witnesses at trial, and the attendant privilege of cross-examination, under oath, before the body responsible for the finding of innocence or guilt. As such, it is intertwined with the origin and development of the hearsay rules of evidence in England—rules which evidenced the same links and tended toward the same ends. The story has been told well by

legal scholars and its details need not be repeated here. See Wigmore, *Evidence* § 1364 (3d ed. 1940) (hereinafter Wigmore); Holdsworth, *History of the English Law,* Vol. IX, pp. 177–187, 214–219, 222–236 (1926); Stephen, *A History of the Criminal Law of England,* Vol. I, 216–233, 324–427 (1883); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 Harv. L. Rev. 177, 179–183 (1948); Morgan, *The Hearsay Rule,* 12 Wash. L. Rev. 1 (1937); see also Note, *Preserving the Right to Confrontation* * * *, 113 U. Pa. L. Rev. 741, 744–745 (1965).

It is helpful, however, to view the procedures from which the claim to confrontation developed. As Holdsworth describes the state of criminal procedure in England towards the end of the sixteenth century, it was almost exactly the reverse of the Sixth Amendment in every detail:

> * * * Thus, as under the old law, persons accused of treason of felony were denied the help of counsel, and they were refused a copy of the indictment. The law as to oral evidence was * * * very new. Though the crown was beginning to call witnesses, there was no clear rule that the prisoner could call them * * *. [H]e was at first refused this right; and when, at the beginning of the seventeenth century, this refusal began to shock public opinion, the illogical expedient was adopted of allowing him to call them and refusing to allow them to be sworn. Similarly, the absence of clear rules as to the admissibility of evidence and as to the conduct of a trial, were used to give advantages to the crown. The witnesses were not confronted

> with the prisoner, * * * and the prisoner himself was closely questioned by the examining magistrate, the judge at trial, and the prosecuting counsel. * * * [T]he privilege of refusing to answer incriminating questions was only established for witnesses at the end of this period; and, even then, it had hardly been extended to the prisoner himself. [*Op. cit. supra,* Vol. IX, p. 224.]

Particularly relevant for present purposes was the function of the examining magistrate, which made possible the denial of confrontation at trial. Statutes enacted in 1554 and 1555 (1 & 2 Phil. & Mary c. 13; 2 & 3 Phil. & Mary c. 10) directed magistrates to interview and take the depositions of all witnesses to felonies;[3] this examination "was intended only for the information of the court. The prisoner had no right to be, and probably never was present. * * * [T]he depositions were to be returned to the court, but there is evidence to show that the prisoner was not allowed even to see them." Stephen, *op. cit. supra,* Vol I, p. 221 (1883). They were, however, commonly introduced into evidence against him at trial.

The claim to confrontation developed in response to defendants' overwhelming disadvantage at trial. Through the depositions which they had secured, prosecutors would be able to present what was to them a carefully rehearsed scenario. As we have seen, the

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[3] Misdemeanors were under the jurisdiction of the Star Chamber, which followed essentially similar procedures with regard to witnesses as those described in the text, on affidavit. Stephen, *A History of the Criminal Law of England,* Vol I, p. 338 (1883).

defendant had little or no warning of the prosecution's case and had no counsel present to assist him. Just because of this, however, he was usually permitted to interrupt the prosecution freely, and to contest each point as it was brought out.

> * * * [T]he trial became a series of excited altercations between the prisoner and the different counsel opposed to him. * * * [T]hey questioned each other and grappled with each other's arguments with the utmost eagerness and closeness of reasoning. * * * As the argument proceeded the counsel would frequently allege matters which the prisoner denied and called upon them to prove. The proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his "accusers," *i.e.* the witnesses against him, brought before him face to face, though in many cases the prisoners appear to have been satisfied with the depositions. [*id.*, 325–326; see also 346–350; 376–377; Holdsworth, *op. cit. supra,* Vol. IX, 225–228.]

The depositions secured by the examining magistrates, in other words, were often the principal "evidence" at trial; defendants clamored for the deponents' presence, not to be able to exclude what they had earlier said, but in order to tussle with them face-to-face and thus perhaps convince the jury of the justice of their cause.

The trial of Sir Walter Raleigh for treason in 1603—described by one author as well-known to those who wrote the Confrontation Clause[4]—is illustrative.

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[4] Heller, The Sixth Amendment 104 (1951).

A crucial element of the evidence against him consisted of the deposition of one Cobham and a letter which Cobham wrote thereafter, both by indirection implicating Raleigh in a plot to seize the throne. Raleigh had a written retraction from Cobham, and believed that Cobham would now testify in his favor; there was a lengthy dispute over Raleigh's right to have Cobham called as a witness. Cobham was not called, although it seems to have been conceded that he was available to be called; and Raleigh was convicted. Stephen, *op. cit. supra,* Vol. I, pp. 333–336; Holdsworth, *op. cit. supra,* Vol. IX, pp. 216–217, 226–228. Again, so far as appears, the objection in Raleigh's case and other similar cases was not that the depositions were received as evidence, but that the witnesses were not called for the defendant to confront them and perhaps elicit another story. The prosecution's objection to Raleigh's claim was not that it would be prevented from using the deposition as documentary evidence, but that the jury might be inveigled should Cobham appear and, under oath, give a new version possibly influenced by "favour or fear," *id.* at 217 n. 2.

During the century that followed, through the domestic political upheaval which characterized it, most of the rights embodied in our Bill of Rights took shape in English practice. In particular, as use of oral witnesses became more common and the risks of permitting the State to introduce untested depositions or affadavits became more apparent, "confrontation" matured from a claim by defendants (that probably

served to alert juries to those risks) to a right to have adverse witnesses present for "face-to-face" encounter, except in special circumstances such as death of the witness or the defendant's procuring of his absence. By 1696, counsel were able to argue to—and almost to persuade—a Parliament considering a bill of attainder that, absent the witness, his deposition should not be let in. *Fenwick's Trial,* 13 Howell's St. Tr. 538, 591 ff., 638, 712, 750.

Hearsay rules developed at about the same time, and in response to at least some of the same pressures as molded the right to confrontation. Since hearsay rules applied to *all* parties, and to civil as well as criminal proceedings, there were not the same considerations of fairness to defendants or of reaction to the excesses of political trials as contributed to the pressure for recognition of the confrontation right. But with the growing use of oral testimony in ordinary trials and the recognition that juries could no longer—and should no longer—decide cases on the basis of what they learned out of court, it was nonetheless necessary to develop rules governing what information the jury should receive in order most accurately to assess the truth; and in this respect, there were undoubtedly shared judgments.

By requiring a party to bring forward the witness himself, and not one who would say what he had heard a witness say, it would be more certain that the best possible evidence would be produced (Blackstone, *Commentaries,* Book III, Ch. 23, p. 368); production of a witness rather than his deposition avoids inter-

polation—careless or otherwise—by the scribe, impresses the seriousness of the occasion upon him, and, through cross-examination, assures a vigorous and thorough sifting of the truth and of the witness' worth (*Id.*, at 373–374). Even before the beginning of the eighteenth century, such considerations had led to the recognition that hearsay was entitled to lesser weight than evidence given *viva voce*, and deserved to be limited to use as corroboration. By the beginning of the eighteenth century, the rule had taken its present contours; in general, hearsay was inadmissible upon objection, but exceptions were recognized for situations such as the dying declaration and the statement against interest, where the law's concerns with "best evidence" and trustworthiness were thought to be satisfied. See Wigmore, *supra*, §§ 1364, 1397–1398, 1420–1503.

In assessing what the drafters of the Sixth Amendment might have meant in protecting the right "to be confronted," these common points must be taken into account. Both developments share the judgment that, absent necessity and some indication of trustworthiness, parties to litigation—and more particularly the prosecution—must present their evidence by witnesses at trial, where they will be subject to exposure to the jury and cross-examination on their testimony by the opposite side. The drafters of the Sixth Amendment were undoubtedly as aware of these similarities and the "best evidence" and trustworthiness functions they served, Blackstone, *supra*, as of the rigors of the criminal and political trials which had

led, in particular, to the elaboration of the confrontation right. But, as this Court has previously recognized, *Snyder* v. *Massachusetts,* 291 U.S. 97, 107, it would be excessive to hold that they made the rules against hearsay a matter of constitutional right. The right to be confronted, like the other rights guaranteed by the Sixth Amendment, was born of cruder wrongs. As we have shown, it was simply the right to have the witnesses present at trial (subject to the exceptions for necessity, not here relevant) where they could be observed, challenged, and tested by cross-examination; so long as that was done, there is no reason to believe that the privilege of confrontation encompassed a right to have excluded from evidence what a witness may have said on a previous occasion, if that could be proved.

III. THIS COURT'S CASES RECOGNIZE THE LIMITED NATURE OF THE RIGHT TO BE CONFRONTED AND ITS INAPPLICABILITY TO THE PRIOR STATEMENT OF A WITNESS AVAILABLE FOR CROSS-EXAMINATION AT TRIAL

Cases in this Court have consistently identified confrontation as a right to have witnesses presented at trial for observation and cross-examination—but without either making that right absolute or limiting the evidence to be received of a witness who was so presented. Thus, the passage most frequently quoted to describe the right arose in a case in which this Court twice recognized exceptions to it, *Mattox* v. *United States,* 146 U.S. 140, 151 (dying declaration); 156 U.S. 237, 240–244 (prior testimony of a witness since deceased):

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. * * * [15 U.S. at 242–243].

The right has sometimes been described in the very fundamental terms of assuring that a jury is to decide a case on the basis only of the evidence put before it in open court. *Turner* v. *Louisiana*, 379 U.S. 466, 472–473; *Parker* v. *Gladden*, 385 U.S. 363. Most often, however, it has been identified as a right to the presence and cross-examination of adverse witnesses at trial,[5] subject to exceptions for necessity such as

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[5] In *Snyder* v. *Massachusetts*, 291 U.S. 97, the Court indicated that the right to confrontation is applicable only to the reception of evidence at the trial, and implies no general right to be present at other stages of the trial—in that case, a view of the scene of the crime. See, to the same effect (by implication) *Costello* v. *United States*, 350 U.S. 359; see also *Green* v. *Bomar*, 329 F. 2d 796 (C.A. 6) (right to confrontation not infringed by denial of a preliminary hearing), vacated on other grounds, 379 U.S. 358; *United States* v. *Johnson*, 129 F. 2d 954 (C.A. 3) (right to confrontation not violated by exclusion of defendant from courtroom during argument on question of law), affirmed, 318 U.S. 189.

were recognized in *Mattox*.[6] *E.g.*, *Dowdell* v. *United States*, 221 U.S. 325, 330; *Snyder* v. *Massachusetts*, 291 U.S. 97, 107; *Greene* v. *McElroy*, 360 U.S. 474, 496–499; *Brookhart* v. *Janis*, 384 U.S. 1, 3–4; *Bruton* v. *United States*, 391 U.S. 123, 126.

In general, the cases in which this Court has found a violation of the Confrontation Clause have involved either a failure to produce the declarant, or some other frustration of or impediment to cross-examination. Thus, in *Kirby* v. *United States*, 174 U.S. 47, the Government sought to prove an element of the offense of receiving stolen postal property—that the property was in fact stolen—merely by showing the convictions of three other persons for the offense of theft. This Court held [*id.* at 55]:

> [A] fact which can be primarily established only by witnesses cannot be proved against an accused—charged with a different offence for

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[6] Since in cases like the present the witness, by hypothesis, is called and available for cross-examination, there is no need to discuss at length these exceptions, under which cross-examination at trial is foregone for reasons of necessity. The issue generally put in such cases is whether there exists a true necessity for admitting the evidence, *e.g.*, *Motes* v. *United States*, 178 U.S. 458; *Barber* v. *Page*, 390 U.S. 719, and whether the circumstances in which the prior statement was obtained render it sufficiently trustworthy to be admitted without present cross-examination, *Mattox*, *supra*. Even in that context—the unavailability of cross-examination at trial—this Court has reiterated that the exceptions are not static or tied to hearsay rules. *Snyder* v. *Massachusetts*, 291 U.S. 97, 107; *Stein* v. *New York*, 346 U.S. 156, 196; *Pointer* v. *Texas*, 380 U.S. 400, 407. But the present case involves a separate issue, since the witness was present and available for unimpeded cross-examination.

> which he may be convicted without reference to the principal offender—except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach * * *.

In *Motes* v. *United States,* 178 U.S. 458, the Government was held responsible for its failure to produce a witness, and thus not permitted to introduce his prior testimony under a claim of necessity. Compare *Reynolds* v. *United States,* 98 U.S. 145, 158–159. In *Pointer* v. *Texas,* 380 U.S. 400, a witness who had not been subject to cross-examination when he made the statement sought to be introduced was unavailable at trial.

Barber v. *Page,* 390 U.S. 719, clearly established that the right to be confronted relates to a witness' presence at trial and the possibility of cross-examining him there, rather than what might have happened at an earlier stage. There, as in *Pointer,* the declarant was not produced at trial; but in *Barber,* he could have been cross-examined at the preliminary hearing where he made the statement sought to be introduced. As it had in *Motes, supra,* this Court refused to consider the adequacy of that prior opportunity once it determined that the prosecution could have taken further steps to secure the witness' presence at the trial:

> The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching ex-

> ploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case. [390 U.S. at 725–726.]

Compare *West* v. *Louisiana,* 194 U.S. 258; *Smith* v. *Illinois,* 390 U.S. 129.

Indeed, in two of its most prominent, recent cases of this type, this Court has assumed that introduction of a witness' prior statement would *not* offend the Confrontation Clause if adequate cross-examination were possible at trial. Thus, in *Douglas* v. *Alabama,* 380 U.S. 415, this Court reversed a conviction secured when the prosecution, through purported cross-examination, read into the record an alleged confession of the defendant's supposed accomplice, Loyd, where Loyd refused to testify on self-incrimination grounds. After emphasizing that the "primary interest secured by [the Confrontation Clause] is the right of cross-examination," and quoting the passage from *Mattox, supra,* p. 16, 380 U.S. at 418–419, the Court held (*id.* at 419–420):

> In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation

> Clause. * * * Loyd could not be cross-examined on a statement imputed to but not admitted by him. * * *
>
> *Hence, effective confrontation of Loyd was possible only if Loyd affirmed the statement as his.* [Emphasis added.]

Nor does it appear that the emphasized passage was unimportant *dictum;* it was repeated at a crucial point in the reasoning of *Bruton* v. *United States,* 391 U.S. 123. That case held that it was a violation of the Sixth Amendment right "to be confronted" to introduce a co-defendant's confession implicating an accused, where the co-defendant did not testify; relying on *Douglas* to reach that holding, this Court quoted the emphasized passage as the core of its reasoning. 391 U.S. at 127. And it indicated that if Bruton's co-defendant had in fact taken the stand, the evidence of his confession—a prior statement—would have been "subject to cross-examination," *id.* at 128, and hence admissible without affront to the Confrontation Clause.[7] Several courts of appeals have followed that suggestion in finding no denial of confrontation with respect to a co-defendant's confessions implicating another where the co-defendant does take the stand and testify. *Santoro* v. *United States,* 402 F.2d 920 (C.A. 9); *United States* v. *Ballentine,* 410 F.2d 375 (C.A. 2), certiorari denied, No. 488 Misc., O.T. 1969,

[7] The Court carefully noted that hearsay, *as distinct from confrontation,* problems were not presented since the confession was admissible against the declarant, a codefendant. *Ibid.,* n. 3.

February 24, 1970; *United States* v. *Boone,* 401 F.2d 659, 663 (C.A. 3), certiorari denied *sub nom. Jackson* v. *United States,* 394 U.S. 933.[8]

The sole possible deviation in this Court's cases is *Bridges* v. *Wixon,* 326 U.S. 135. In two earlier cases, this Court had adopted as a matter of evidentiary law, under the hearsay rule, what Wigmore terms the "orthodox rule" (*op. cit. supra,* § 1018) that prior inconsistent statements are admissible only for impeachment purposes. *Hickory* v. *United States,* 151 U.S. 303, 309; *Southern Railway Co.* v. *Gray,* 241 U.S. 333, 337. But the hearsay rule may be altered by statute, as California sought to do here, unless the effect is to deny confrontation or some other constitutional right. Neither of these cases found any such denial. *Bridges,* however, could be read as affording the rule constitutional force. There, a witness, one O'Neil, allegedly had at one time stated to investigating officers that he had seen Bridges engage in activities

[8] The same conclusion may be reached with respect to other, established practices. Thus, there is no valid confrontation objection to introducing evidence that a witness had identified the accused as the culprit at some point before trial, even if the witness is unable to identify him in the courtroom. *United States* v. *Anderson,* 406 F.2d 719 (C.A. 4), certiorari denied, 395 U.S. 967; see also *Gilbert* v. *California,* 388 U.S. 263, 272–273, n. 3. And where the prosecution's evidence includes the physical analysis of some substance, for example of blood for alcoholic content in connection with a drunken driving charge, it is permissible to introduce the written report of that analysis, another prior statement, together with the oral testimony of the analyst without offending the Confrontation Clause. *E.g., Kay* v. *United States,* 255 F.2d 476, 480–481 (C.A. 4), certiorari denied, 358 U.S. 825.

demonstrating Communist party membership. At a deportation hearing, he admitted making statements to the officers and that those statements were true, but he denied that in his statements he had said anything about Bridges' Communist activity. The prior statements were proved, *inter alia,* by stenographic report, and this Court held that reliance upon them was error:

> The statements which O'Neil allegedly made were hearsay. We may assume they would be admissible for purposes of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence. *Hickory* v. *United States,* 151 U.S. 303, 309 * * *. So to hold would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded. * * * [326 U.S. at 153–154.]

So far as we are aware, the latter part of this quotation had no precedent and has never since been repeated by this Court. The fault it suggests is not violation of the right to confrontation, but offense to rather amorphous concepts of fairness or due process, not susceptible of ready definition. To the extent this Court has recognized that juries may not be equal to the complex task of using evidence for one purpose but not another, *e.g., Bruton, supra,* it is evident that permitting impeachment use, in itself, permits the results the Court stated to be unfair. And it is plain that the law frequently permits unsworn evidence to be admitted against defendants in criminal trials—

whether prior identifications, dying declarations, business and official records, or the like.[9] But in any event, if "unfairness" is the test, we believe that test is readily met in cases like this one. It is to that proposition that we now turn.

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[9] The constitutionality of such statutes as 28 U.S.C. 1732 and 1733 (made applicable to criminal trials by Rules 26 and 27, F.R. Crim. P.), which provide for the admissibility of certain types of business and official records has been sustained. See *e.g. United States* v. *Leathers*, 135 F. 2d 507, 511 (C.A. 2); *United States* v. *Holmes*, 387 F. 2d 781, 783–784 (C.A. 7), certiorari denied, 391 U.S. 936; cf. *Palmer* v. *Hoffman*, 318 U.S. 109; *Salinger* v. *United States*, 272 U.S. 542, 547–548.

There is no express statutory requirement that oaths be administered to witnesses in criminal cases in the federal courts outside the District of Columbia (compare, as to the District, *Gillars* v. *United States*, 182 F. 2d 962, 969–970; 14 D.C. Code 101). F.R. Crim. P. 26, provides only that:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

See also F.R. Crim. P. 54(c); *Moore* v. *United States*, 348 U.S. 966, reversing *per curiam*, 217 F. 2d 428 (C.A. 7); *Wilcoxon* v. *United States*, 231 F. 2d 384, 386–387 (C.A. 10), certiorari denied, 351 U.S. 943; *Gillars* v. *United States*, 182 F. 2d 962, 969–970 (C.A.D.C.); *Ferguson* v. *Georgia*, 365 U.S. 570; *Washington* v. *Texas*, 388 U.S. 14; Wigmore, §§ 1815–1818.

IV. FAIRNESS PERMITS EVIDENTIARY USE OF A WITNESS' PRIOR STATEMENT AT TRIAL, WHERE THE PROSECUTION IS NOT IMPLICATED IN THE WITNESS' FAILURE TO MAKE THE STATEMENT AT TRIAL AND THE ACCUSED HAS AN UNIMPEDED OPPORTUNITY FOR CROSS-EXAMINATION

Virtually all commentators who have discussed the issue conclude that a witness' prior statements should be permitted evidentiary weight at trial, so long as the witness is then available for effective cross-examination. *E.g.,* Wigmore, *op. cit. supra,* § 1018;[10] Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 Harv. L. Rev. 177, 195 (1948); Weinstein, *Probative Force of Hearsay,* 46 Iowa L. Rev. 331, 333 and n. 15 (1961); McCormick, *The Turncoat Witness; Previous Statements as Substantive Evidence,* 25 Texas L. Rev. 573 (1947); Falknor, *The Hearsay Rule and Its Exceptions,* 2 U.C.L.A. L. Rev. 43, 48–55 (1954); *Uniform Rules of Evidence,* Rule 63(1); ALI, *Model Code of Evidence,* Rule 503(b); *Proposed Rules of Evidence for the United States District Courts and Magistrates,* Rule 8–01(c)(2), pp. 163–167 (1969); but see Maguire, *Evidence: Common Sense and Com-*

[10] Wigmore initially took the "orthodox" position that such evidence should be excluded, but subsequently was convinced that the "natural and correct" conclusion was to admit the statements as affirmative evidence. *Ibid.,* at n. 2.

mon Law 59–63 (1947).[11] To be sure, these comments are made in considering appropriate policies for the law of evidence as a whole, under the hearsay rubric, and often do not consider, as such, the constitutional issues this Court must resolve regarding the use of such statements against defendants in criminal trials. Yet their evident, and overriding, concern is for the accuracy and fairness of a fact-finding process committed to the adversary system for ascertaining truth and to cross-examination as an essential feature of that system. A procedure which satisfies that concern could not be said to violate constitutional requirements of fairness.

An initial consideration, it appears to us, is the undoubted duty of the prosecution to use its best efforts to produce evidence through the direct testimony of witnesses in court, at trial. No case of which we are aware has permitted the use of other types of testimony where such efforts have not been forthcoming, and in some, for example *Motes* and *Barber, supra,* the failure of the prosecution to exercise care and diligence has been central to the result. Indeed, one commentator has been led to suggest that in devising a constitutional rule of confrontation, as distinct from an evidentiary rule of hearsay, this Court should treat it as "a canon of prosecutorial behavior * * *

[11] There has been persuasive judicial criticism as well. See, *e.g.*, *DiCarlo* v. *United States*, 6 F. 2d 364, 368 (C.A. 2, L. Hand, J.); *United States* v. *DeSisto*, 329 F. 2d 929, 933–934 (C.A. 2, Friendly, J.).

requir[ing] that the prosecutor make a diligent, good-faith effort to produce witnesses to testify"—that he not make the testimony "less reliable than it might have been." Note, *Confrontation and the Hearsay Rule,* 75 Yale L.J. 1434, 1439 (1966). Where a witness is sworn and questioned, and only subsequently does the prosecutor seek to introduce a prior statement the witness made which is inconsistent with his testimony at trial, it is evident that such best efforts have been forthcoming.

Assuming the prosecutor has, as here, put forward his best efforts to secure in-court testimony, the question arises what considerations would justify further restrictions on his ability to produce a substitute. For as this Court early recognized:

> [The] general rules of law of this kind, however beneficient in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. * * * The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused. [*Mattox, supra,* 156 U.S. at 243.]

The guide suggested in that case by the Court—that the Constitution is satisfied if the prisoner once has "the advantage * * * of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination," *id.* at 244—is, we believe, met in a case like this, where the witness testifies in court and is subject to full cross-examination. It is met irrespective whether the prior statement was under oath or

subject to cross-examination when made. For even though the witness does not presently repeat that statement under oath, he is available for full examination on what the truth of the matter was, the issue the trial is meant to resolve.[12] Indeed, the defendant is under less of a disadvantage regarding a jury's[13] accurate assessment of that truth than he would be

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[12] As Professor Morgan has observed, where a witness testifies at trial:

> * * * whether or not [he] at the time of the utterance was subject to all the conditions usually imposed upon witnesses should be immaterial, for the declarant is now present as a witness. If his prior statement is consistent with his present testimony, he now affirms it under oath subject to all sanctions and to cross-examination in the presence of the trier who is to value it. * * * If the witness testifies that all the statements he made were true, as in the *Bridges* case, then the only debatable question is whether he made the statement; and as to that the trier has all the witnesses before him, and has also the benefit of thorough cross-examination as to the facts which are the subject matter of the statement. * * * If he concedes that he made the statement but now swears that it wasn't true, the experience in human affairs which the average trier brings to a controversy will enable him to decide which story represents the truth in the light of all the facts. * * * In any of these situations Proponent is not asking Trier to rely upon the credibility of any one who is not present and subject to all the conditions imposed upon a witness. Adversary has all the protection which oath and cross-examination can give him. Trier is in a position to consider the evidence impartially and to give it no more than its reasonable persuasive effect. * * * [*Op. cit. supra*, pp. 195–196.]

[13] While respondent was tried to the court, having waived jury trial, the right to confrontation, historically and practically, relates principally to the jury's role as fact-finder, and this discussion is therfore couched in terms of that role.

in the *Mattox* circumstances, where the evidence and cross-examination of a deceased witness is read to the jury from the cold record. The necessity to the prosecution is as great in this case as it was in *Mattox,* for if it cannot introduce the evidence of what the witness previously said, it cannot put its adversary view of the truth before the jury.

In order to justify entrusting an evidentiary matter to the jury, one must be sure the jury can reliably assess it. Perhaps it was doubts on this issue which led the Court to remark in *Bridges* v. *Wixon, supra,* that reliance on prior, unsworn statements would be unfair. Indeed, the argument against the view espoused in this brief rests in large part on the danger of manipulation of out-of-court statements, particularly where the statements are taken in private, with neither oath nor judicial presence to solemnize them. Maguire, *op cit. supra,* 59–63; McCormick, *op. cit. supra,* 586.

As an initial matter, we remark that the *Bridges* v. *Wixon* dictum has no relevance to prior statements which consist of sworn testimony, subject to cross-examination when made, as at a preliminary hearing. One of the statements sought to be introduced in this case was of this type. As to it, there was no substantial risk of manipulation or misrecording, and there is no reason to believe that a jury could not be depended upon reliably to assess the truth of such issues as were raised by the conflict in Porter's statement then and at the trial. As the commentators cited above have discussed at length, while statements made at trial have the

advantage of being made directly to the jury, trial may occur years after the event; an earlier statement is, if anything, likely to be more reliable, in view of the shorter period of time and the frailties of human memory. Here, the defense's claim that the prior statement ought to be disbelieved rested on Porter's alleged bias against Green and the possibility that Porter was under the influence of hallucinogens at the critical times. Those issues were fully explored at the trial, both with Porter and with persons who had observed him at the times concerned. The fact-finder had the benefit of every advantage that cross-examination and observation could give in reaching its conclusion.

We believe it would be equally wrong to exclude unsworn statements, such as the statement Porter made to Officer Wade, just because they are unsworn. Given the availability of cross-examination, the situation with respect to such statements is no different than that which applies to out-of-court statements of the defendant himself, evidence of which is regularly admitted. The law already recognizes the reliability of a witness' prior statements in a number of ways, for example, by permitting prosecutors to refresh their witness' recollection or to impeach witnesses whose memory cannot be "refreshed."[14] As this Court recognized in both *Douglas* and *Bruton*, such acts, even if limited by jury instruction, may influence the determination of guilt. Moreover, if the concern

[14] See also the discussion at pp. 20–21 and n. 8, *supra*.

is that in some cases such statements might have been casually made, that concern is plainly inapplicable in cases like this one, where the witness testifies fully about the interview in question, and independent circumstances (here, the attempted sales transaction arranged with Porter's help) tend to corroborate the statement made. Sufficient indicia of reliability are present in such cases to justify favoring "public policy and the necessities of the case," *Mattox, supra,* 156 U.S. at 243, by admitting the evidence of the statement.

Finally, we note that it is not necessary to decide in this case the more difficult issues which would be presented by a witness who testified but denied making any statement at all, or denied having made some part of the statement on which the prosecution seeks to rely. In the former case, the argument for admissibility would have to overcome the objection that the witness had not "affirmed the statement as his," *Douglas, supra,* 380 U.S. at 420, and thus had not opened up the possibility of meaningful cross-examination. The case of the witness who denies only part of a statement attributed to him, the *Bridges* v. *Wixon* situation, does not seem subject to that objection. The jury is fully able to observe demeanor, and the witness will have a full opportunity on cross-examination to explain what his statement really was, and how any mistake came to have been made. The happening of the event can be reliably determined on the basis of the evidence presented, under oath, at trial.[15] See *United*

[15] An example can be drawn from the *Bruton* context. If one of two defendants in a joint trial has confessed his participa-

States v. *Ballentine*, 410 F. 2d 375 (C.A. 2), certiorari denied, No. 488 Misc., O.T. 1969, February 24, 1970.

But these issues need not be reached here. No risk of *prosecutorial* distortion of the evidence exists in a case like this one, where the witness freely testifies that the statements attributed to him were in fact ones he made. What remains to support exclusion of the evidence is principally the law's preference that evidence be introduced live where possible. That was not possible here, and against the preference must be balanced the very real risks of witnesses who forget, or somehow are reached by the defendant and per-

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tion in the offense, and has also implicated his co-defendant, the co-defendant's opportunities for cross-examination are more limited where the alleged confessor entirely denies making any confession than in the case where he admits to having confessed but denies having implicated his co-defendant. In the former case, all that can be investigated is whether the statement was made or not; the co-defendant will be unable to test the particular matter which concerns him, the allegation that he too had participated; and it would be improper to infer from the conclusion that the statement was made that all of its details were true. Where the confessor admits the confession, but denies having implicated his co-defendant, cross-examination can more readily reach the truth of that issue.

Such considerations have led two circuits to reason in the *Bruton* context that it is error to permit the jury to hear confessions implicating a co-defendant, even if the alleged confessor testifies, where the confessor entirely denies having made the statement. They have distinguished the cases cited above at pp. 20–21 on the basis that admission to having made a statement is the *sine qua non* of effective inquiry and cross-examination. *Townsend* v. *Henderson*, 405 F. 2d 324, 329 (C.A. 6); *O'Neil* v. *Nelson*, No. 23,149 (C.A. 9), decided January 26, 1970, sl. op. 3–6.

suaded to change their tune. So long as the defense is able to expose and contradict the flaws in testimony through the adversary process, the prosecution ought to be able to present all matters which reliably tend to establish the truth of guilt. The evidence of witness Porter's prior statements in this case, admitted by him, corroborated by outside circumstances, and fully subject to examination at trial, did just that.

The fundamental error of the California Supreme Court, in our view, is that it failed to distinguish between the situation where an attempt is made to introduce the statement of a witness who is not available for cross-examination before a jury and the situation presented here, where the witness is available for cross-examination as to both his present testimony and his earlier inconsistent statement. Certainly on the facts here (and of its prior decision in *Johnson*) the California court's conclusion that there could be no effective cross-examination at trial as to the prior statements is unsupported. While a state or the federal government is free to fashion exclusionary rules of evidence stricter than constitutionally necessary where that is suggested by considerations of policy, nothing in the Confrontation Clause or elsewhere in the Constitution justifies the reversal on federal constitutional grounds of the conviction in this case.

CONCLUSION

It is therefore respectfully submitted that the judgment of the California Supreme Court that the prior inconsistent statements in this case were constitu-

tionally inadmissible should be reversed and the cause remanded for proceedings not inconsistent with this Court's opinion.

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